PP

v.

FRANCIS KUIN

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[CRIMINAL TRIAL NO: 45-05-2003-II]
9 JANUARY 2006

CRIMINAL PROCEDURE: *Sentence - Adequacy - Mitigating factors - Consideration of - Child Act 2001, ss. 2(1) & 76 - Penal Code, s. 304(a)*

The accused was originally charged for an offence of murder under s. 302 of the Penal Code when he first appeared in this High Court on 30 July 2003. Subsequently, the prosecution preferred an alternative charge under s. 304(a) of the Penal Code for committing culpable homicide not amounting to murder by causing such bodily injury as was likely to cause death. The accused pleaded guilty to the alternative charge and understood the nature and consequences of his plea. The court thereafter found the accused guilty and convicted him accordingly while the deputy public prosecutor withdrew the principal charge and the court acquitted and discharged the accused of the same. Counsel for the accused urged the court to impose a bond of good behaviour under ss. 294A or 173A of the Criminal Procedure Code or alternatively to send the accused to Henry Gurney School until he attained the age of 21 years. In doing so, he urged the court to take into consideration the various mitigating factors of extenuating circumstances, plea of guilt, clean antecedent of the accused, the feelings of regret and remorse of the accused, co-operation with the police, duration of the accused being under remand from 24 December 2002 until 9 January 2006 (for about three years) and the effect of the conviction upon the accused. The deputy public prosecutor, however, submitted that the offence for which the accused had committed and pleaded guilty was a serious offence and public interest should be taken into account.

Held:

(1) The accused had pleaded guilty to the alternative charge and had saved much of court's time and expenses. The accused was a child within the definition of 'child' under s. 2(1) of the Child Act 2001 (' the Child Act') as he was a person under 18 years of age at the time of commission of the offence. From the brief facts of the case, at the time of the commission of the offence, the accused and the victim with some friends were engaged in a drinking session of alcohol and it was due to some misunderstanding and arguments that subsequently the accused hit the victim with a piece of wood which resulted in the victim's death. The homicide committed by the accused was not premeditated and not one where 'the act by which the death was caused was done with the intention of causing death'. The accused was also a first offender and has a clean antecedent. This court was of the view that public interest would be best served if the accused was given an opportunity to turn over a new leaf rather than commit the accused to a term of imprisonment whereby he may be unnecessarily influenced by undesirable elements. Pursuant to s. 76 of the Child Act, the accused was hereby ordered to be detained at the Henry Gurney School until he attained the age of 21 years so that he could be rehabilitated for the remaining period of his stay there. (paras 7, 8, 15)

Case(s) referred to:
Lim Yoon Fah v. PP [1971] 1 MLJ 37 ***(refd)***
Melvani v. PP [1971] 1 MLJ 137 ***(refd)***
Mohamed Abdullah Ang Swee Kang v. PP [1988] 1 MLJ 167 ***(refd)***
Mohamed Jusoh Abdullah & Anor v. PP [1947] MLJ 130 ***(refd)***
New Tuck Shen v. PP [1982] CLJ 38; [1982] CLJ (Rep) 606 HC ***(refd)***
PP v. Jafar Daud [1981] 1 MLJ 315 ***(refd)***
PP v. Khairuddin [1982] 1 MLJ 331 ***(refd)***
PP v. Mark Koding [1983] 1 MLJ 111 ***(refd)***
PP v. Tan Chee Seng & Ors [2004] 1 MLJ 392 ***(dist)***
R v. Ball 35 Criminal Appeal Report 164 ***(refd)***
Raja Izzuddin Shah v. PP [1979] 1 MLJ 270 ***(refd)***
Teh Yew Whatt v. PP [1958] MLJ 171 ***(refd)***

Legislation referred to:
Child Act 2001, ss. 2(1), 76, 91(e), 98
Criminal Procedure Code, ss. 173A, 294A
Juvenile Courts Act 1947, s. 40
Penal Code, ss. 302, 304(a), 393, 397

For the accused - Wit Malang; M/s Wit & Co
Osman Ibrahim; M/s Osman Ibrahim & Co
For the prosecution - Syarifuddin Hj Abdul Rasa DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

[1] The accused, Francis anak Kuin, was originally charged for an offence of murder under s. 302 of the Penal Code (exh. A) when he first appeared in this High Court on 30 July 2003. Subsequently, the prosecution preferred an alternative charge under s. 304(a) of the Penal Code (exh. B) on 9 December 2005 as follows:

> That you on the 23rd day of December 2002, at about 11.30 p.m., at unnumbered house, Sungai Apong, Kuching, in the state of Sarawak, committed culpable homicide not amounting to murder by causing such bodily injury as was likely to cause death of one THEN HON FUI (M) and you have thereby committed an offence punishable under section 304(a) of the Penal Code.

[2] The accused is represented by his assigned counsel Mr. Wit Malang and assisted by Mr. Osman Ibrahim. The accused pleaded guilty to the alternative charge and understood the nature and consequences of his plea. He admitted to the brief facts of the case (exh. C), First Information Report, Balai Polis Bintawa, Kuching Police Report No. 1874/2002 (exh. P1), the post-mortem report (exh. P2) and the 16 photographs and negatives of the place where the victim was found (exh. P3 A-P and exh. P3N (A-P)) and 9 photographs and negatives of the post-mortem (exh. P4 A-I and exh. P4N (A-I) respectively and 1 piece of wood (exh. P5). The court thereafter found the accused guilty and convicted him accordingly. The learned DPP Syarifuddin bin Haji Abdul Rasa withdrew the principal charge and the court acquitted and discharged the accused of the same.

[3] Both the learned counsel for the accused had urged the court to have a probation report prepared before the accused's plea in mitigation was taken as the accused was a child at the time of the commission of the offence. Although the court has initially mentioned that a probation report be prepared pursuant to s. 91(e) and s. 98 of the Child Act 2001 (Act 611) ("the Child

Act"), the court would like now to state that a probation report is ordered pursuant to s. 76 of the Child Act (almost in *para materia* with s. 40 of the Juvenile Courts Act 1947 (Act 90) which is now repealed) and following the case of *Teh Yew Whatt v. PP* [1958] MLJ 171 and also *Lim Yoon Fah v. PP* [1971] 1 MLJ 37. This is because s. 91(e) and s. 98 is a section pertaining to the making of a probation order which is not applicable here since the offence committed by the accused is a grave crime which under s. 2(1) of the Child Act is defined to include "the offences of murder, culpable homicide not amounting to murder or attempted murder". The probation report was tendered on 9 January 2006 through the probation officer and marked as exh. P6 and which was admitted by the accused.

[4] On behalf of the accused, his counsel, Mr. Wit Malang, tendered a written plea in mitigation marked as exh. D1. The learned DPP has taken objection to certain paragraphs in exh. D1 namely:

(1) It was revealed that the victim had also indulged in drinking elsewhere as it was observed that the victim was behaving rather unsteadily and he has also brought one bottle of "langkau" (local-brewed liqueur) to be consumed.

(2) The accused was cursed, ridiculed and scolded by the victim. It was also noted that during this time, the victim was also seen showing obscene signs/gesture to the annoyance of the accused. On seeing this, the situation became tense.

(3) Then after about 15 minutes later, the accused and Francis – *sic* (Sebastian) came out and still in the process of offering drink when he was attacked for unknown reason by the victim. Apart from that he was also harassed and cursed which led to free fracas and brawling between them.

[5] Upon review of the brief facts of the case *vis-a-vis* the paragraphs objected to above, I find that I am in agreement with the learned DPP that his objection ought to be sustained because the accused had admitted to the brief facts of the case without qualification and the paragraphs objected to above by the prosecution, in my view, have not been subjected to any cross-examination and there is no means by which the court can verify as to its truth.

[6] Mr. Osman Ibrahim submitting on behalf of the accused has urged the court to impose a bond of good behaviour under s. 294A or s. 173A of the CPC or alternatively to send the accused to Henry Gurney School until he attained the age of 21 years. In doing so he has further urged the court to take into consideration the various mitigating factors of extenuating circumstances, plea of guilt, clean antecedent of the accused, the accused feeling of regret and remorse, co-operation with the police, duration of the accused being under remand from 24 December 2002 until 9 January 2006 (for about three years) and the effect of the conviction upon the accused. To support his submission, Mr. Osman Ibrahim cited various authorities namely – (1) *New Tuck Shen v. PP* [1982] CLJ 38; [1982] CLJ (Rep) 606; (2) *PP v. Khairuddin* [1982] 1 MLJ 331; (3) *Mohamed Jusoh bin Abdullah and Another v. PP* [1947] MLJ 130; (4) *Melvani v. PP* [1971] 1 MLJ 137 (also [1969-1971] SLR 464); (5) *Mohamed Abdullah Ang Swee Kang v. PP* [1988] 1 MLJ 167; (6) *PP v. Jafar bin Daud* [1981] 1 MLJ 315; (7) *Lim Yoon Fah (supra)*; (8) *Raja Izzuddin Shah v. PP* [1979] 1 MLJ 270; (9) *PP v. Mark Koding* [1983] 1 MLJ 111 and (10) *Teh Yew Whatt (supra)*.

[7] First and foremost, the court has considered that the accused has pleaded guilty to the alternative charge and has therefore saved much of court's time and expenses. Further, based on exh. P6, it is undisputed that the accused was a child within the definition of "child" under s. 2(1) of the Child Act as he was a person under 18 years of age at the time of commission of the offence or to be specific aged 17 years 6 months and 5 days. It is also undisputed that from the brief facts of the case, at the time of the commission of offence the accused and the victim with some friends were engaged in a drinking session of alcohol and it was due to some misunderstanding and arguments that subsequently the accused hit the victim with a piece of wood (exh. P5) which resulted in the victim's death. As confirmed by the post-mortem report the cause of death was "head injuries with fracture skull and liver laceration due to blunt object". There are 2 limbs under s. 304(a) of the Penal Code. From the charge framed against the accused, it is clear that the homicide committed by the accused was not premeditated as it reads "committed culpable homicide not amounting to murder by causing such bodily injury as was likely to cause death of one THEN HON FUI (M)" and not one where "the act by which the death is caused is done with the intention of causing death".

[8] The accused is also a first offender and has a clean antecedent which is confirmed by the probation report (exh. P6). He comes from a poor family background whereby his father works as a lorry attendant earning RM15 a day and his mother works as a security guard earning RM500 a month and there are 8 members staying in the same house including the accused. The accused's level of education was only up to Form 3 and it is unfortunate that he chose not to further his studies because of lack of interest. Nevertheless, he did not lay idle but worked as a construction worker earning RM18 a day and was skilled in fixing pipes. Although he has a good relationship with his parents and other members of his family, he has admitted that he likes to smoke and drink but not to the extent of being involved in any drug activities. I do note also that he has a healthy hobby of fishing and enjoys games like playing basketball and football.

[9] The learned DPP submitted that the offence for which the accused has committed and pleaded guilty to is a serious offence and public interest should be taken into account. It is to be noted that the accused is candid enough not to deny the offence is a serious one which has involved the loss of a life and is also a relative at that. Nevertheless, as confirmed by the probation report, the accused is remorseful for the offence that he has committed as it has brought about much difficulty and embarrassment to his family; and further he is desirous of starting afresh in life if given a chance by looking for a job in Johor Bharu after the completion of whatever sentence is meted out to him.

[10] The court also takes into account that he has co-operated with the police during the course of investigation by admitting to the offence of culpable homicide not amounting to murder early when his cautioned statement was recorded on 31 December 2002.

[11] Finally, it must not be forgotten that the accused has been under remand since his arrest on 24 December 2002 until to-date which covers a span of about three years wherein he and his family were undeniably placed under anxious circumstances as to the outcome of the accused's future.

[12] The court, therefore, has to balance the public interest factor *vis-a-vis* the various mitigating factors pleaded by the accused. In this context the court takes cognisance of a passage from the case of *R v. Ball* 35 Criminal Appeal Report 164, as follows:

> In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence *and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.* (emphasis added).

[13] The above case was cited in *Lim Yoon Fah (supra)* wherein Chang Min Tat J (as he then was) opined that the learned Sessions Judge had failed to consider the aspect of safeguarding public interest as set out in the passage of Hilbery J in *R v. Ball (supra)* when he set aside the sentence of 30 months imprisonment and 4 strokes of the rotan in respect of an offence of robbery under s. 393 and s. 397 of Penal Code and placed the accused (appellant) under a bond of good behaviour under s. 294 of the CPC.

[14] As for the case of *PP v. Tan Chee Seng & Ors* [2004] 1 MLJ 392, although it is a case of culpable homicide not amounting to murder for which the 3 accused persons had pleaded guilty in the midst of the trial and the court had imposed custodial sentences of imprisonment, I would like to distinguish it from the facts of the present case.

[15] Weighing all the factors together, I am of the view that public interest would be best served if the accused is given an opportunity to turn over a new leaf rather than commit the accused to a term of imprisonment whereby he maybe unnecessarily influenced by undesirable elements. In the circumstances of this case, in the exercise of my discretion pursuant to s. 76 of the Child Act, the accused is hereby ordered to be detained at the Henry Gurney School, Sabah until he attains the age of 21 years so that he can be rehabilitated for the remaining period of his stay there. In addition, exh. P5 is to be handed to the prosecution for disposal in the event there is no appeal.